

Show Canceled? Release Delayed? A Musician's Guide to COVID-19 and "Force Majeure"

For many artists confined to their home over the next several weeks, one phrase that has entered our lexicon more frequently than any other is "force majeure." For music promoters, touring artists, recording artists and record labels, this phrase has been incorporated into most every contract and rider you have signed over the years. Until recently, this provision was seemingly innocuous, with parties' negotiations focused instead on artist guarantees, advances, royalty rates and production budgets. Amid the outbreak of COVID-19, however, many states have issued executive orders that require music venues to shut down for several weeks (or even months), concerts and tours to be cancelled entirely, and artists to be confined to their homes and "socially distanced" from one another. Thus, "force majeure" has taken center stage as one of the most analyzed provisions in artist agreements over the past few weeks. So what is this clause, and how does it affect you and your ability to make a living during this global pandemic?

According to Merriam-Webster's Dictionary, a "force majeure" is a "superior or irresistible force; or an event or effect that cannot be reasonably anticipated or controlled." When it comes to contract drafting, a "force majeure" clause allocates risk between parties to a contract and explains what happens if the parties are unable to perform their contractual obligations due to an event beyond their control. Many contracts will describe "force majeure" events as including natural disasters, war, labor strikes, governmental orders, or in the case of COVID-19, a global pandemic. However, not every contract uses the same "force majeure" clause, which means your rights and obligations may vary depending on how the "force majeure" clause contained in your agreement is drafted and interpreted.

For example, the term "force majeure" is often defined differently from one contract to the next. In this regard, many agreements define "force majeure" to include "Acts of God." But let's be honest. This phrase is no clearer than "force majeure," which often leads parties to disagree as to what is covered by an "Act of God." Many lawyers believe this phrase refers only to serious weather conditions that make it impossible for an event to take place. Other lawyers, however, believe an "act of God" is to be distinguished from man-caused events (like war, terrorism and labor strikes), which therefore

would cover any naturally caused event, such as health pandemics like COVID-19.

Of course, the best possible definition of "force majeure" would be one that includes specific reference to specific events, like global health pandemics, so that there is no debate as to whether a "force majeure" event has occurred. However, even if your contract does not specifically refer to health pandemics, there likely is other language in your agreement that may apply to COVID-19. For example, many agreements define "force majeure" to include "governmental orders or regulations," as well as "any event beyond the parties' control that makes performance impossible, infeasible or unsafe." Given that governors of many states, including New York, California and Illinois, have issued executive orders that make it impossible for events to take place (or which request people to stay in their homes), it is likely that COVID-19 qualifies as a "force majeure" event even if your contract does not specifically refer to the existence of a health pandemic.

There are also differences in how contracts describe how the parties' contractual obligations are impacted when a "force majeure" event is deemed to occur. For example, some clauses say that when a "force majeure" event exists, the parties may terminate the contract with no further obligations to one another. This type of provision is typically contained in live performance agreements, in which case a performance is anticipated to occur on a single day (like during a music festival) but cannot take place because weather conditions make it impossible or unsafe. In this case, the "force majeure" clause will often say that both the artist and promoter will be excused from their contractual obligations, which means the artist does not have to perform, and the promoter does not have to pay the artist. But some "force majeure" clauses will say that an artist may keep the deposit they received before the force majeure event occurred, while other clauses will require artists to return their deposit, or will allow them to keep their deposit only if they are "ready, willing and able" to perform. This can create disagreement between the parties in determining who should bear the financial risk of having an event cancelled.

Other agreements will not provide for immediate termination of a contract due to a "force majeure" event,

but rather will provide one party with the ability to extend or suspend the contract term during the “force majeure” event. This relief is typically found in recording agreements and gives the record label the right to notify the artist that it is suspending the contract term for the duration of the “force majeure” event. These provisions, however, are not without their own limits. For example, many contracts will only allow for a suspension last for a definite period of time, such as six months or a year, before the contract must either proceed or be terminated. It should go without saying, of course, that such delays could still place the artist in an uncomfortable state of limbo, which could hamper the artist’s ability to create and release music during that time. Thus, artists should be aware of whether such a clause exists in their contract, and if so, what limitations and exceptions exist that may provide some flexibility and control over their career should a “force majeure” event like COVID-19 occur.

There is a bit of a silver lining to this ordeal. Despite the various ways that “force majeure” clauses are drafted and interpreted, we are finding that artists, promoters, agents and record labels are working together to find creative and mutually-beneficial ways to deal with the consequences of COVID-19. For example, in exchange for artists’ agreement to perform on rescheduled festival dates, some promoters are allowing artists to keep deposits that ordinarily would need to be returned. This provides promoters with much needed certainty they will be able to hold their event on a later date without incurring as substantial a loss, while also providing artists with much needed financial assistance during this turbulent time.

Similarly, producers and artists are holding online songwriting and recording sessions via digital platforms like FaceTime and Zoom, and are exchanging session files via programs like Apple Notes and Dropbox, which is facilitating remote collaborations and the creation of new music. And given the predominance of digital distribution, record labels are also able to maintain many scheduled releases of their artists’ music, which in turn is providing fans with new music to consume while stuck at home. Thus, deals are continuing to get inked, and music is continuing to get created and released, albeit in a slightly different manner than folks would have anticipated a few months ago. Should you find yourself confronted with a question of whether your contract is being delayed or terminated due to COVID-19, you should consider whether there may be reasonable and creative ways to address the issues you are dealing with before simply calling it quits due to a “force majeure” event.

Of course, considerations that go into drafting and interpreting “force majeure” clauses expand well beyond what we have time to discuss in this email. It therefore is important for you to sit down with your contracts and read over your “force majeure” clauses so that you fully

understand what your rights and obligations are in the event that it become unsafe, impracticable or impossible for you to perform your contractual obligations due to COVID-19 or another event beyond your control. Should you need help understanding what your contract says, or in resolving a dispute arising out of a canceled or suspended agreement, please feel free to reach out to one of our lawyers, who can assist you in assessing your rights.

Finally, beyond consideration of the “force majeure” clause, there are other avenues that may be available to you to assist you during these turbulent times.

Financial Relief is Available from MusiCares

If you have suffered losses as a result of canceled shows, there may be financial assistance available to you from the Recording Academy through its charitable affiliated charitable foundation—MusiCares. MusiCares provides a safety net of critical assistance for music people in times of need. Its services and resources cover a wide range of financial, medical and personal emergencies, and each case is treated with integrity and confidentiality. According to the Recording Academy, “MusiCares is aware of the enormous financial burden to those whose creative practices and incomes are being adversely impacted by COVID-19. We are deeply saddened that it is resulting in loss of work due to venue closures, festival and event cancellations and travel restrictions. To help address the concerns of the industry during this time, we have expanded our services to include lost income due to the cancellation of scheduled gigs or performances due to Coronavirus/COVID-19 precautionary measures.”

Of note, you do **NOT** have to be a member of the Recording Academy to receive this assistance. Rather, all of the benefits that MusiCares makes available to the artist community are available to all artists regardless of whether they are members of the Recording Academy. If you are being impacted by the Coronavirus crisis and need support, please click on [this link](#) to learn more about what assistance may be available to you.

Host Virtual Shows

Given that we are all at home, anyway, artists have access to “captive audiences” and audiences even have access to “captive artists.” Thus, many artists have taken to social media to host “virtual concerts” to entertain their fans. This has become a particularly more practical way for artists to interact with fans given the many video-conferencing platforms (like Facebook Messenger, Zoom and Facetime) available. While artists are posting much this content simply to provide fans with some free entertainment while stuck at home, you may want to consider that many of your fans were likely gearing up to see you perform live at a concert that has now been cancelled. These fans likely also understand that you are losing a significant source of

income that you were expecting to receive over the next few months, and they would be happy to help you make some extra cash while on lockdown. Thus, hosting virtual concerts could be an excellent way for you to engage with your fans while your fans help you mitigate some of the losses caused by your cancelled events. Especially now that technology (Zelle, CashApp, PayPal, and Venmo) makes it so easy to exchange payments online, artists can easily host mini-concerts from their home and accept payments and donations from their audience. We encourage you to get creative in how you roll these concerts out. Perhaps you continue to hold free concerts for your fans on Facebook, and then offer to host “private” Zoom concerts for smaller groups at a higher ticket price. Mixing in free shows with some paid events can certainly help keep fans engaged and assist you in generating some additional income while we are all at home.

Create and Collaborate Online

Even before COVID-19, an increasing number of artists are holding online songwriting and recording sessions via digital platforms like FaceTime and Zoom, and exchanging session files through programs like Apple Notes and Dropbox. These platforms facilitate remote collaborations between artists and allow for the creation of new music during a period of “social distancing.” Thus, get your creative juices flowing and take this opportunity to create with some new potential collaborators.

Up Your Social Media Game

One complaint we often hear from artists is that they are “too busy” to really develop their social media presence. Perhaps you are on the road performing 200 days a year, or are in the studio for hours each day creating music that you just forget to take the time to promote the music you are creating on your social media channels. Now may be the most opportune time for you to get more familiar with the various platforms available for you to engage with your fans, many of whom are now sitting at home staring at their phones, tablet and computers 450% more frequently (my not-too-scientific estimate) than they were when working 8 to 10 hours a day. So create something new, something fans haven’t seen before, something that brings you closer to them. Check out platforms you may not have used before—TikTok, for example, is a behemoth when it comes to music discovery, and many artists over the age of 25 have never even checked it out. Dedicate some time to create content that you can post on a regular basis over the next month so you can create a schedule of consistent fan engagement. And if you are a group that cannot physically get together to create this content because you are “social distancing,” so what? You don’t have to be in the same room to create your content. Take, for example, several high school choirs that have recorded their performances on phones and computers and synched them up to create an viral performances.



You can check out their performance [here](#).

Prepared by Swanson, Martin & Bell, LLP
partner [Jeff Becker](#). Contact Jeff at
jbecker@smbtrials.com.

This newsletter has been prepared by Swanson, Martin & Bell, LLP for informational purposes only and does not constitute legal advice. Receipt of this information does not create an attorney-client relationship. Please contact professional counsel regarding specific questions or before acting upon this information.